

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals, District of Columbia

OCTOBER TERM, 1907.

515

No. 1826.

WILLIAM H. CONGER, ADMINISTRATOR OF THE ESTATE
OF GEORGE CONGER, DECEASED, APPELLANT.

vs.

BALTIMORE AND OHIO RAILROAD COMPANY, A
CORPORATION.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED SEPTEMBER 3, 1907.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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In the Court of Appeals of the District of Columbia.

No. 1826.

WILLIAM H. CONGER, Administrator, &c., Appellant,
vs.
BALTIMORE AND OHIO RAILROAD Co., a Corporation.

a Supreme Court of the District of Columbia.

At Law. No. 48951.

WILLIAM H. CONGER, Administrator of the Estate of George Conger,
Deceased, Plaintiff,

vs.

BALTIMORE & OHIO RAILROAD COMPANY, a Corporation, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to-wit:

1 *Declaration.*

Filed November 21, 1906.

In the Supreme Court of the District of Columbia.

At Law. No. 48951.

WILLIAM H. CONGER, Administrator of the Estate of George Conger,
Deceased, Plaintiff,

vs.

BALTIMORE & OHIO RAILROAD COMPANY, a Corporation, Defendant.

The plaintiff William H. Conger, Administrator of the estate of George Conger, deceased, duly appointed such by the Supreme Court of the District of Columbia, holding a special term for Probate Court, and who now here brings his Letters of Administration in that behalf, sues the defendant, the Baltimore & Ohio Railroad Company, a corporation, for that on to wit, June 25, 1906, and at

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Be it remembered, that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to-wit:

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Filed November 21, 1906.

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Deceased, Plaintiff,

vs.

BALTIMORE & OHIO RAILROAD COMPANY, a Corporation, Defendant.

The plaintiff William H. Conger, Administrator of the estate of George Conger, deceased, duly appointed such by the Supreme Court of the District of Columbia, holding a special term for Probate Court, and who now here brings his Letters of Administration in that behalf, sues the defendant, the Baltimore & Ohio Railroad Company, a corporation, for that on to wit, June 25, 1906, and at

the time of the grievances hereinafter mentioned, the said defendant corporation, having offices and agents in the District of Columbia, and doing business herein, was engaged as a railroad in running its passenger and freight trains over its tracks in said District of Columbia, and in such running of its trains crossed parts of the public highways, streets and roads of travel used by pedestrians and vehicles in and about said District of Columbia; and at Langdon, this District, at the general road or street crossing there for the use of pedestrians and vehicles in crossing said defendant com-

2 pany's tracks, and on account of the highly dangerous nature of this said railway crossing, the said defendant corporation had placed an alarm or signal bell, to warn pedestrians or drivers of vehicles who might be seeking to cross over said tracks at this point, of the approach of any nearby train; and it then and there became and was its duty to so keep and maintain its said signalling apparatus or electric alarm bell in good order and condition, and in proper and fit repair, that it might properly perform its object, and serve as a safe and proper warning to would-be passers over said railroad crossing, of any approaching trains, or their dangerous proximity to said crossing; but notwithstanding its said duty in the premises, said defendant corporation became and was negligent in its failure to supply a reasonably safe and proper electric signal bell or apparatus at this crossing, and became and was negligent in its failure to keep the electric signal bell or apparatus actually supplied in a reasonably safe, proper and fit condition for the purpose for which it was intended; and on the day aforesaid, when plaintiff's intestate, an infant of tender years, was riding on the back step of a milk wagon, and was then and there being driven across said railway tracks, and while so riding across said tracks, and along the regular road of travel at this point, and while without negligence or fault on his part, or on the part of the driver of said milk wagon, but because the said electric signalling bell or apparatus which was placed there

3 by said defendant company to warn people passing over said crossing, of approaching trains as aforesaid, was out of order and repaired, and did not warn or indicate approaching trains, said plaintiff's intestate was struck and killed by an approaching passenger train, which was then moving along and over said defendant company's tracks at the road crossing as aforesaid; that he has thereby been specially damaged for funeral expenses in to wit: \$150; and the plaintiff says that said intestate left surviving him as his only next of kin, the plaintiff, decedent's father, who has suffered great damage and who will continue to suffer great damage in the future by reason of the negligently caused death of the plaintiff's intestate as aforesaid.

Wherefore the plaintiff says that by reason of the premises a cause of action has accrued to him as Administrator as aforesaid, as by Statute in such case made and provided, and for the benefit of said next of kin mentioned as aforesaid, who has sustained damage in the sum of \$10,000., which amount he claims besides the costs of this suit.

Second Count.

The plaintiff, William H. Conger, Administrator of the estate of George Conger, deceased, duly appointed such by the Supreme Court of the District of Columbia, holding a special term for Probate Court, and who now here brings his Letters of Administration in that behalf, sues the defendant, the Baltimore & Ohio Railroad Company, a corporation, for that, on, to wit, June 25, 1906, and at the

4 time of the grievances hereinafter mentioned, the said defendant corporation, having offices and agents in the District of Columbia, and doing business herein, was engaged as a railroad in running its passenger and freight trains over its tracks in said District of Columbia, and in such running of its trains crossed parts of the public highways, streets and roads of travel used by pedestrians and vehicles in and about said District of Columbia; and at Langdon, this District, at the general road or street crossing there for the use of pedestrians and vehicles in crossing said defendant's company's tracks, it then and there became and was its duty to have any approaching train signal its proximity to said road crossing, and pass over said crossing at a reasonably safe and proper speed; but notwithstanding its said duty in the premises, it became and was negligent in that on the day aforesaid, and at the place aforesaid, and by and through its servants or agents, it permitted one of its said trains to approach said crossing without ringing any bell, or whistling, or in any other manner indicating its approach, and did permit its said train to pass across and over said street or road crossing at the point at a high, unlawful, improper and unsafe rate of speed, whereby and because of which said negligence, said plaintiff's intestate, an infant of tender years, who was riding across this said railway crossing on the back step of a milk wagon and while being so driven, and while without negligence on his part, and

5 without any negligence on the part of the driver of said milk wagon, was struck and killed by an approaching passenger train so as aforesaid negligently managed and controlled; that he has thereby been specially damaged for funeral expenses in to wit, \$150.; and the plaintiff says that said intestate left surviving him as his only next of kin, the plaintiff, decedent's father, who has suffered great damage, and who will continue to suffer great damage in the future by reason of the negligently caused death of the plaintiff's intestate as aforesaid.

Wherefore the plaintiff says that by reason of the premises a cause of action has accrued to him as Administrator as aforesaid, as by Statute in such case made and provided, and for the benefit of said next of kin mentioned as aforesaid, who has sustained damage in the sum of \$10,000., which amount he claims besides the costs of this suit.

LEONARD J. MATHER,
Att'y for Pl'ff.

Notice to Plead.

The defendants are to plead hereto on or before the twentieth day exclusive of Sundays and legal holidays occurring after the day of service hereof; otherwise judgment.

LEONARD J. MATHER,
Att'y for Pl'ff.

Plea.

Filed December 13, 1906.

In the Supreme Court of the District of Columbia.

At Law. No. 48951.

WILLIAM CONGER, Administrator, Plaintiff,
vs.
BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation,
Defendant.

Now comes the defendant and for a plea to the plaintiff's declaration filed in the above-entitled cause, and each count thereof, says that it is not guilty in manner and form as alleged.

HAMILTON, COLBERT & HAMILTON,
Attorneys for Defendant.

Joinder of Issue.

Filed December 19, 1906.

In the Supreme Court of the District of Columbia.

At Law. No. 48951.

WILLIAM CONGER, Administrator, Plaintiff,
vs.
BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation,
Defendant.

7 The plaintiff joins issue on the Plea of the defendant filed herein.

LEONARD J. MATHER,
Att'y for Pl'ff.

Memorandum.

May 28, 1907.—Verdict for defendant.

Supreme Court of the District of Columbia.

FRIDAY, *June* 7, 1907.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * *

At Law. No. 48951.

WILLIAM H. CONGER, Administrator of the Estate of George Conger,
Deceased, Pl'tf,

vs.

BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Def't.

Upon hearing the plaintiff's motion for a new trial, it is considered that the same be, and hereby is overruled, and judgment on verdict ordered:

8 Therefore, it is considered that the plaintiff take nothing by his suit, and that the defendant go thereof without day, and recover against the plaintiff the costs of its defense to be taxed by the Clerk, and have execution thereof.

The plaintiff notes an appeal to the Court of Appeals of the District of Columbia, and the penalty of the bond for costs is fixed in the sum of one hundred dollars (\$100.).

Memorandum.

July 20, 1907.—Appeal bond filed.

Supreme Court of the District of Columbia.

SATURDAY, *July* 20, 1907.

Session resumed pursuant to adjournment, Mr. Justice Anderson presiding.

* * * * *

9 By Justice Wright.

At Law. No. 48951.

WILLIAM H. CONGER, Administrator of George Conger, Pl'tf,
vs.

BALTIMORE AND OHIO RAILROAD COMPANY, Def't.

Now comes here the plaintiff by his Attorney and prays the Court to sign, seal and make part of the record, his bill of exceptions taken at the trial of this cause, now for then, which is accordingly done.

Bill of Exceptions.

Filed July 20, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 48951.

WILLIAM H. CONGER, Administrator of George Conger,
vs.

BALTIMORE AND OHIO RAILROAD COMPANY.

Be it remembered that this cause came on for trial on the 27th day of May, 1907, before Mr. Justice Wright and a jury.

Whereupon the plaintiff to maintain the issues on his part joined testified in his own behalf as follows:

I am the plaintiff in this case and am suing as administrator of my son's estate. I reached the scene of the accident at Langdon Station about 9:25 A. M., and my son was killed about 7:30 A. M. There are two tracks at this crossing running in a southwesterly direction. Trains from Baltimore to Washington pass over the West bound track and trains to Baltimore pass over the East bound track. The Pathfinder Building is on the west side of the track, about 62 feet from the crossing. There is a row of trees up here (indicating in the direction of Baltimore) and it hides the track. You can't see very well—only about 100 yards. The track up there is in a sort of cut, and there is a row of trees along there that shades the track, and you see about a quarter of a mile up to where there is a curve. There are no gates at the crossing. There is an electric bell there. There is also a telegraph pole right close to the crossing. Approaching these tracks along the road from the East there is a fringe of trees up the track and then a sort of a cut that hides the track a good bit. I don't believe you can see over 100 yards up there at most, especially in summer time when the trees are in leaf. You have to go right up to the tracks before you can see to the curve, which is a quarter of a mile away. You can see right up to the curve then. I have noticed trains coming from Baltimore, and you can't see them until they get a good ways from the curve. It seems to be dark in the cut there. It seems to shade them and hide them. You can't see them until they get about—well I suppose 100 or 150 yards. I was present when the photographs of the crossing were taken. The physical conditions of the crossing were the same on the day the pictures were taken as they were on the day of the accident. I pass over there four times a day, and there has been no change of any kind. My son would have been thirteen years old the 16th of last August if he had lived.

On cross-examination the witness said:

This boy was going to school. He had no occupation of any kind, but worked at odd jobs helping Mr. Welker wash milk bottles. He

just went with Mr. Welker that morning. My wife says she told him to go. He had no employment on that day. I have lived at Langdon nine years next March, and my house is about 400 yards away from the crossing. You can see the railroad plain from the house. This boy had always lived there with me, and was familiar with the conditions around there. A clump of trees is on the south-east side of the tracks coming from the direction of Baltimore. There is a pole there, and a telegraph pole at the crossing that hides the trains. My house is on the east side of the crossing, about 400 yards away.

Whereupon plaintiff to further maintain the issues on his part joined, called as a witness GEORGE DUVALL, JR., who testified as follows:

I am a photographer and took the photographs of the railroad crossing at Langdon which are marked Exhibits 1, 2, 3 and 4.

On cross-examination the witness said:

Picture No. 1 was taken with the camera looking towards Baltimore. Picture No. 2 was taken right over by the road looking towards the way the train was coming. Picture No. 3 was a view in the same direction looking towards Baltimore. They were all taken looking the same way. None of them were looking towards Washington.

Whereupon plaintiff to further maintain the issues on his part joined called as a witness SAMUEL B. POSEY, who testified as follows:

I am employed in the Pathfinder building, which is near the railroad crossing at Langdon. The Pathfinder building is about 20 yards from the center of the track. There are two buildings there, and the entrance between the two buildings is just opposite the crossing. At the time of the accident I was standing right between the two buildings, in a kind of court, and opposite the center of the crossing. The wagon approached the crossing from the East and was coming towards me. The train was going from Baltimore to Washington on the West bound track, which was the one nearest to me. A man named Welker was driving the milk wagon, and I saw him approach the tracks. His horse was trotting along, and when he got to the first rail, he looked as if he kind of made it stop, and then he started to go across. When he got in the middle of the track he looked as if he was going to turn to the right and switched his horse kind of off to the right, and then all at once he drew the horse to the left and hit the horse, and just at that time the train hit it. The train struck the wagon about a foot and half from the end. It was going pretty fast. I should think it was about 13 60 miles an hour. I was accustomed to watching trains pass there, and I could tell about the speed an engine was making. After the train hit the wagon the train stopped about a quarter of a mile up the track near Montello. I can't say if the train signalled its approach. I was standing talking to a young fellow at the time and did not hear any whistle blow. In fact you could not

hear anything between those two buildings. It keeps the sound away. I did not hear the bell, and can't say it was ringing that morning. I would not swear that the bell was ringing or was not ringing. I was talking with Harry Hayes. There is a curve in the track towards Baltimore, about 300 or 400 yards away from the crossing. There is a sharp curve up there. There was nothing else between that curve and the crossing to prevent one's seeing a train coming. Approaching the track in the direction that the wagon did there was nothing to obstruct the view other than a telegraph pole and a bell pole. There is a little bank there which obstructs the view of the curve until you get right on the track, and when you get to the track you have a view; but before you get to the track you can't see it. The track is clear on the side opposite to me, but it is not so clear on this side, because there is a very short turn, after you get across the track to get on the street. From the crossing you can see a train coming from Baltimore about 350 or 400 yards away; or something of that kind. I never measured it. You can't see the train coming until after it rounds the cut.

On cross-examination, the witness said:

- 14 My place of business is on the West side of the tracks about 20 yards from the center of the double tracks. There are two tracks and a siding at the crossing. At the time of the accident I was standing between two buildings facing down the road on which the wagon was travelling towards me. I first noticed the milk wagon when it was 100 yards from the track. At that point a man can see a train approaching for about 100 yards before it reaches the crossing. There is a clump of trees and a big bank which would prevent him seeing further from that position. When he reaches the track he can see about 300 or 350 yards. You can see further and further down the track as you approach the crossing. The neared to the crossing he gets the more he can see down the track towards Baltimore, and there is nothing to obstruct the view except a bell pole and a telegraph pole. When he is about 20 yards from the crossing he can see perhaps 200 yards down the track towards Baltimore, and he can see still further as he approaches the tracks. When I first saw Welker 100 yards away from the crossing he was driving right along and the horse kept on at a steady trot until he got about on the East bound track which was about 14 feet away from the center of the West track. When he reached that point he could see 350 yards towards Baltimore. He started to pull his horse to the right, then he drew him to the left, then he struck the horse and just at that time the engine hit the wagon, and broke the horse loose from the wagon. It seemed to me that when he got between the two tracks he turned his horse as if to pull off to the right, and then
- 15 he changed his mind and turned to the left and was hit. I do not remember whether the engine whistled or not, or whether the bells were rung. I pay no attention to whether the whistles are blown or bells are sounded out there.

On redirect examination the witness was asked the following question:

Q. I want to ask you what you have to say as to whether that is a dangerous crossing or not.

Whereupon counsel for defendant objected and the objection was sustained by the court, to which ruling of the court counsel for plaintiff then and there excepted, and said exception was duly entered upon the minutes of the court. Whereupon witness was asked the following question:

Q. How many deaths to your knowledge have occurred there?

To which question counsel for the defendant objected and the objection was sustained, to which ruling of the court counsel for plaintiff then and there excepted, and said exception was entered upon the minutes of the court.

Whereupon plaintiff to further maintain the issues on his part joined called as a witness HARRY E. HAYES, who testified as follows:

I have lived at Langdon, D. C., about 4 years. I was about 22 yards from the crossing at the time of the accident, and was standing between the two buildings of the Pathfinder plant, talking to Mr. Posey. I have been employed there about a year.

Whereupon counsel for the plaintiff asked the witness the following question:

Q. What do you know as to whether that crossing is dangerous or not?

To which question counsel for defendant objected, and the court sustained the objection, to which ruling of the court counsel for plaintiff then and there excepted, and said exception was duly noted upon the minutes of the court.

Whereupon the following question was asked the witness:

Q. Do you know of any other accidents that have happened there prior to this Conger accident?

To which question counsel for defendant objected, and the objection was sustained and plaintiff excepted to the ruling of the court, which exception was duly noted upon the minutes of the court.

Witness further testified as follows:

I first saw the milk wagon approaching the crossing when it was a short square away from the tracks. I did not continue to watch the wagon and did not see it come close to the track. I paid no more attention to it until it was struck. Approaching the crossing from the direction in which the wagon came there are some trees about 200 yards up the track, which impede the view. As you get nearer the track the telegraph poles are the only thing in the way. I did not see the train strike the wagon. I heard the crash and saw the timbers flying in the air. That was what attracted my attention. The train was going pretty fast, because it

did not stop until it got to the next station, about three quarters of a mile away. I could not give any idea as to how fast it was going, but I judge it to be about 55 miles an hour.

Q. When you get on the tracks what, if anything, is there that prevents your seeing towards Baltimore? A. The trees.

Q. How far away can you distinguish a train coming from Baltimore towards Washington? A. Just after it leaves that curve you can get a glimpse of it.

Q. How far is that curve away? A. I judge about half a mile. I don't remember whether it blew before it struck the wagon or not, but I know it did not blow when the wagon was on the track, because if it had I could have heard it. I know it didn't blow after it passed the curve. The electric bell rings pretty loud, when it does ring, but it was not ringing that morning, as I didn't hear it. I would sure have heard it if it had been ringing.

On cross-examination the witness said:

I don't know whether the engine blew for the crossing or not. I don't remember saying to Mr. Egan shortly after the accident that I heard the engine blow for the crossing. I don't remember whether the train blew when it came around that bend or not. I don't mean to say it did, and I don't mean to say it did not. I say
18 I have forgot it. I don't mean to deny that I signed a statement for Mr. Egan saying that the whistle blew. I say I have forgot it. I did not see the boy Conger but Mr. Welker appeared to be on the seat of the wagon by himself. He had to cross over one track before reaching the track on which the train was running. There are two sidings there, one on each side, but the one on the East side stops just before it reaches the crossing.

Q. Do you mean to say the electric bell did not ring at that time? A. I did not hear it.

Q. Do you mean to say that it did not ring? A. I say I did not hear it.

Q. Is it not a fact that you were not paying any attention to the conditions around that crossing just at the time the accident happened? A. No sir, I was not.

Q. Might it not have been that the bell did ring and you did not pay any attention to it? A. If it had rung I certainly could have heard it.

Q. Is it possible or probable that it might have rung and you not hear it? A. No sir, I don't — it is.

Q. Are you prepared to say it did not ring? A. I told you I did not hear it.

Whereupon the plaintiff to further maintain the issues on his part joined called as a witness EDWARD J. WALL, who testified as follows:

I am a member of the Metropolitan Police force, and have
19 been stationed around the neighborhood of Langdon. I was at the station the time of the accident, but did not see it. There is a crossing near the station. When the wagon was struck I was at the patrol box about 100 yards away with my back to the

crossing. I could not say whether I heard the bell ring or the whistle sound before the accident. I was not paying any attention. I was using the telephone at the time. There had been an accident at Corby's factory and I was calling up the ambulance to take the injured party to the city. There is an electric bell at the crossing but I could not state whether it was ringing or not. I was telephoning at the time and could not remember whether it was ringing or not.

Whereupon witness was asked the following question:

Q. Immediately after that was the bell ringing?

To which question the counsel for the defendant objected, and the objection was sustained, to which ruling of the court the plaintiff then and there excepted, and said exception was noted upon the minutes of the court.

I have been at Langdon about eight years. The bell has been more or less out of order. It would ring sometimes for hours at a time, and then sometimes it would not ring at all. It would be out of order. I don't know if it was out of order at the time of the accident, but I was right there near the body of this boy after the accident occurred and the first train that came along after that the bell rang.

Whereupon witness was asked the following question:

20 Q. Did you ever call the attention of the railway officials to the fact that this bell was out of order immediately preceding this Conger accident?—and counsel for defendant, objecting, the objection was sustained, to which ruling of the Court, the plaintiff then and there excepted, and said exception was then and there noted by the court upon its minutes.

No cross examination.

Whereupon the plaintiff to further maintain the issues on his part joined called as a witness ARTHUR BUDDINGTON, who testified as follows:

I have lived at Langdon 15 or 16 years. At the time of the accident I was coming up the railroad track and stopped at the depot and talked to the agent, and I just glanced up the tracks as the train struck the hind part of the wagon. I was talking to the agent. I was outside of the ticket office and the agent was inside.

Q. Is there a signal bell at that crossing. A. Yes; there is one at the crossing.

Q. Was it ringing that morning? A. No sir; I did not hear it.

Q. Would you have heard it if it had rung? A. Yes sir. There is a ticker inside the office connected with the bell, which notifies the agent when a train is coming, but that was not working. I was six or eight feet from it. I think the ticker is connected with the bell. I did not see the wagon approach the crossing. Looking to-
wards Baltimore from the crossing there is a belt of trees
21 pretty much on both sides of the track, about a quarter of a mile away or less. Approaching the crossing from the direction in which the milk wagon came I should judge you could see

up the track two squares or three squares. I could not say just how many yards but I should judge about 100 yards or 150 or 200 yards, or something like that. There is a cut along there, a big embankment, about the same distance away that the trees are, which prevents you seeing up these tracks. I did not hear the train whistle or ring any bell. I have not an idea how fast the train was going. After the accident it ran almost down to the next depot, which is a little over a quarter of a mile away. Had occasion to pass over this crossing pretty much every day and observed that signal bell for a week prior to the Conger boy's death. Some days the bell would ring and some days it wouldn't. I never paid no attention to the bell on the crossing, but looked up and down the track the best I can, and then go across. I never paid no attention to the bell.

On cross examination witness said:

I am in the dairy business, and had been to a store in Langdon and was on my way back when the accident happened. I was standing talking to the agent, parallel to the accident, with my side turned towards the crossing. My face was not towards it, and I was talking earnestly with the operator. Quite a number of trains pass there and I never stand around and notice whether they whistle or not. I never pay any attention to that. I did not hear any whistle that morning, but I could have heard it if it blowed and I have been paying attention.

22 Q. As you approach the crossing from the East, can you not see, unobstructed by any building, trees or obstructions of any kind at least 200 or 300 yards up this track before you reach the crossing? A. No.

Q. What would prevent it. A. Trees and one thing and another. The treets start a little this side of the curve. I could not say just how many yards they are from the crossing. I said the cut was two blocks from the crossing, and it is not a deep one. Standing at the crossing you could not see the train unless you got right up on top of the cut. I do not know if the cut is a quarter of a mile from the crossing. I judge it is about two squares or more. I do not know how long an ordinary block is. I am not very much up on that. I should judge it to be about 200 yards. Approaching the crossing along the road 30 or 40 yards back from the track, the trees and the cut obstruct the view. The trees begin about two blocks from the crossing. The cut starts gradually, I guess about 100 yards from the crossing, and goes right straight on up gradually to as much as 60 feet deep in some places. As you approach nearer to the crossing you can see the track down as far as the bend. I can't say how far that is. I don't know if it is a quarter of a mile, or an eighth of a mile. I should judge it was about 400 yards. You can see that far when you get to the first track, although you could not see that far at 20 yards from the track. The crossing is about 40 or 45 yards from the depot where I was standing. I could have heard the

23 indicator if it was sounded. It is a separate instrument inside of the agent's room, which tells whether the signal bell is ringing at the crossing.

Whereupon the plaintiff to further maintain the issues on his part joined called as a witness JOHN ARCHER SMITH, who testified as follows:

That he lives on Bladensburg Road near Langdon. That he was standing on the platform of the station at the time of the accident, and saw the Conger boy killed. When he first saw the wagon it was right at the lamp-post near the crossing, where it stopped. The lamp-post is right at the crossing, and the driver stopped this side of the crossing—on the east side—and looked up and down the track to see if a train was coming, and then he started to cross, got all the way over except the two hind wheels which were hit. He saw the boy standing on the back of the milk wagon. There is an electric bell at that crossing which is supposed to ring when trains come. It did not ring for that train. When it rings you can hear it a good ways off. The train blew for the target, but it did not blow for the man to get off the track. The target was right there at the depot. The train had to pass the crossing before it got to the station. The train blew when it was coming around the curve, which is a quarter of a mile or a half mile away, around the bend out there towards Reeves. It did not blow after that. The boy was thrown as high as the telegraph wires and about half way from the crossing

24 to the station. After the accident the train did not stop until it got way down to Winthrop Heights, a quarter of a mile away. It was running about a mile a minute. There are no gates or watchman at that crossing. The railroad agent was sitting in the office and Buddington was standing at the window there talking to him. There are trees along the track up around the curve, a quarter of a mile from the crossing. Then there are some high banks which prevent you from seeing very good. You can see the train a half mile away from the crossing.

On cross-examination witness said:

I am eighteen years of age and I have been living there 8 or 9 years. The station is about 40 or 50 yards from the crossing, and the target is at the station, and the train came around the curve, a quarter of a mile away, and blew for this target. I heard it. When the whistle blew the station agent pulled the target and changed the color of it.

Q. Did not the engineer respond by another whistle showing that he had seen the target changed? A. No, sir. There was just one blow. When I first saw the wagon it was standing right still at the lamp-post. A person standing at the lamp-post could see up the track clear to the curve, a quarter of a mile away. There was nothing to obstruct the view then. The train whistled after I saw the wagon at the lamp-post. When the whistle blew the wagon was crossing the first track. It whistled afterwards when the wagon was going across the tracks. I saw the driver hit the horse, and the horse

25 made a lunge to try to get across the track, but the rear part of the wagon was struck by the train. The driver stopped and looked up this track but didn't see any train. I did not testify before the coroner that the first time I saw the wagon was

just at the moment it was struck. A day or two after the accident one of the railroad men came to me and wrote out a statement of what I knew of the accident. I stated at that time that the engineer blew two long and two short blasts on the whistle when the engine was near the overhead bridge. That is my recollection now as to what happened. The overhead bridge is this side of the curve; I can't say how far from the crossing, but I guess a little more than 200 yards. Those signals were for the target and were made before it got to the crossing.

Whereupon the plaintiff to further maintain the issues on his part joined called as a witness WILLIAM E. WELKER, who testified as follows:

I live at Langdon about a quarter of a mile away from the crossing. There is an electric signal bell at the crossing which can be heard about 100 yards away. On the morning of the accident I was driving a covered milk wagon which was like an ordinary delivery wagon used by grocers, drawn by one horse. I started out to deliver milk and was driving from the seat on the front end of the wagon. The wagon was something near 7 feet long and there was quite a large horse in, anyway 16 hands high. George Conger was on the step at the rear of the wagon. Approaching the crossing in the way I did there are bushes and trees to stop the view down the track. They are probably 100 yards away. I could not
26 say positively. I passed over the crossing from four to six times a day, and crossed before that morning but the bell was not ringing. The engineer on the train did not ring his bell or blow his whistle. I drove up to the crossing right by the bell and checked my horse. I looked both ways and saw nothing and then drove on to the track. I was looking towards the city and I suppose probably the noise of the train attracted my attention. I looked around and it was right near me. I looked towards Baltimore first, as I had a more direct view that way than the other. I saw nothing from either direction. And then I looked again towards Baltimore and saw this train which was probably 200 feet away at that time, and I then struck the horse with the whip. The engine broke about two feet off the hind part of the wagon. I was thrown out and went probably about 30 feet and the boy was thrown quite a ways, possibly 75 feet. I never measured it. The accident happened about 7:30. The bell was out of order and did not ring a week prior to the accident. It rang some times when trains came along. It failed to ring when a train came down a short time afterwards.

On cross-examination the witness said:

I knew that sometimes the bell rang and sometimes it did not when trains passed along. I knew that the morning of this accident, I am hard of hearing in my right ear. The boy was on the wagon to help me deliver milk. He was to go to work that morning for me, but he did not go out on the first trip. I did not know that he

27 was on the back of the wagon until I got near the railroad. I didn't see him get on. I had employed him and he was to go with me on the first trip, but he didn't go. The second trip he got on the wagon as I was leaving home. I don't know when he got on. When I was looking up the track I noticed him standing on the wagon. That was probably 100 feet away from the crossing. I looked towards Washington when I saw him and afterwards looked towards Baltimore. I must have been within 12 or 15 feet of the track when I looked towards Baltimore and I could not see any train. I guess I could see in that direction less than a quarter of a mile. Just as we started on the track I looked again. I was then 10 or 15 feet from the West bound track and I could see nothing. I have been crossing that track about 9 years.

Q. How far up towards Baltimore could you see? A. I guess it was less than a quarter of a mile.

Q. Do you mean to say that you could not get across that crossing while the train was coming a quarter of a mile? A. Not the way that train was coming. I was going across slow. Everything looked clear and no bell rung.

Q. Did you look again towards Baltimore when you got ready to cross? A. Just as we started on the track.

Q. Just as you started over the first track you looked towards Baltimore? A. When we were ten or fifteen feet from the track.

Q. Did you look up the track when you got to the track?
28 A. I did.

Q. And you could not see anything? A. No, sir.

Q. How far up towards Baltimore could you see? A. I guess it is less than a quarter of a mile.

Q. I mean after you got on the track? A. You can see but very little further than you can when you are 10 feet from it.

Q. On what rail was your horse when you saw this train coming? A. I couldn't say that.

Q. Do you mean to say that you attempted to go across these tracks without looking towards Baltimore? A. I didn't say that. I looked towards Baltimore.

Q. Did you testify at the coroner's inquest? A. I did.

Q. Is it not a fact that if you had looked towards Baltimore as you got on that first rail you could have seen a quarter of a mile? A. That depends on how far it is. It is something near a quarter of a mile.

Q. You can see up as far as the curve, can you not? A. You can see as far as the curve.

Q. Is it not a fact that when you saw that train coming from Baltimore you had not got on that other track? A. No, sir. I was on that track when I saw the train.

29 Q. The train was a quarter of a mile away? A. The train was not a quarter of a mile away when I saw it.

Q. Did you look up towards Baltimore just before your horse got on the first track? A. The horse must have been somewhere near the track and maybe a few feet over the track.

Q. How many feet? A. Probably 4 or 5. I was probably 10 or

12 feet away. When 4 or 5 feet from the track you could see as far as the curve which was hardly a quarter of a mile away. Between the rails of each track there is a distance of something like 4 feet and between the tracks something like 6 feet.

Q. Do you mean to say that you could not travel fifteen feet while that engine was coming a quarter of a mile? A. I don't say that.

Q. Then how did you happen to get hit? A. I was going across that track when I saw that train.

Q. You ran in front of an express train without looking to see whether it was coming or not, did you not? A. No, sir.

Q. Did you not hallo to the boy to jump off? A. I did not. I hollered to him to hold on, when I struck the horse with the whip.

Q. In other words you tried to get over in front of that train?

A. I tried to get from in front of it.

30 Q. You were trying to get in front instead of waiting for it to pass? A. I tried to get from in front of it when I saw the train coming right towards me.

Q. Did you hear that train blow? A. It didn't blow. I did not notice the target.

Q. Did you say that you stopped your wagon altogether? A. I checked my wagon.

Q. Did you stop it? A. I couldn't say positively that the horse was stopped dead still, but I checked it up so I could look.

Q. You don't know whether you stopped or not? A. I couldn't say that. I checked up. I pulled up until I looked. I approached at a trot until I got within about 20 feet of the track. Then I slowed down to a walk and when I got to the track I don't know whether I stopped or not, but I pulled my horse up right near the post so I could look towards Baltimore. When I first saw the train it looked to me as if it was a couple of hundred feet away. I was then on the track. I think it must have been the one the train was on.

Whereupon the plaintiff to further maintain the issues on his part joined was himself recalled as a witness and testified as follows:

The decedent would have been 13 years old his next birthday, which was the 16th of August. He had worked for Mr. Welker washing milk bottles and going on the wagon, and had worked
31 around the house. He always brought the money he earned home and gave it to his mother. He was a very intelligent boy and a very large boy. He would do all the work around the house. He had not been regularly employed except when helping Welker.

Whereupon the following question was asked:

Q. What, if anything, had he said to you about employment at the butterine factory?

Which, upon objection, the witness was not allowed to answer—and also the following:

What, if any, promises, had he made to you as to what he would do in the future and

Q. What, if any, promises had me made to you up to the time of his death as to what he would do with what he earned in the future; which being objected to by defendant's counsel, and each objection being sustained, exceptions thereto were then and there noted by the Court upon its minutes.

This was all the evidence offered on behalf of the plaintiff.

Whereupon counsel for the defendant moved the court on all the evidence to instruct the jury to return a verdict for the defendant, but said motion was overruled.

And thereupon the defendant to maintain the issues on its part joined called as a witness THOMAS A. TIMBERLAKE, who testified as follows:

I am agent for the B. & O. at Langdon, D. C. I was at the station on the morning of June 25, 1906, at the time of the accident.

32 I am block operator and agent. I received a report of this train as approaching from Alexandria Junction, from the operator at that point. That is about four miles away from Langdon. I then watch for the approach of the train and when the engineer blows for the target I then pull up the target lever which gives him a red, white or green whichever it may be. I gave him the clear signal—the white signal. The target is right in front of my window, but the semaphore is, of course, above the roof. The crossing is about 200 or 250 feet from the target and towards Baltimore. The engineer blew a long blast for the target and I gave him a clear signal and after giving him the clear signal he answered me by two short toots of the whistle. When the engine blew for the target he was 5 or 6 telegraph poles away. These poles are 75 feet apart. When he answered the target why I would think he was about—oh, he was only about 1 pole length away from the crossing. When he blows for the target it only takes me a matter of a very short while to pull my lever and as soon as he sees the paddle thrown down he answers. Those signals were given on this morning. I saw this wagon when it was within 50 feet of the crossing. It came trotting up to the track and I naturally supposed that he would stop before he crossed over but instead of that he did not make any halt whatever. He trotted right up to the East bound track and as the horse's feet struck the East bound track it stopped trotting and went over walking, but in doing so he was crossing right in front of this train. I was surprised to see that he would attempt to cross in such close

33 quarters as that. I saw the driver strike his horse to make him get over as soon as possible but the engine struck the wagon. I did not see the boy, before he was hit. He was thrown near the switch target and the momentum of the train caused him to roll towards me about 50 feet. The train was running 35 or 40 miles an hour. Standing at the crossing and looking towards Baltimore you can see to the curve which is, I suppose, about a mile. The overhead bridge is near the curve. I stepped off 45 feet from the

East bound track along the road on which the wagon approached the crossing to make observation, and I found that you could see towards Baltimore at least half a mile down the track, but a man sitting on a wagon could see much further because you have a much better sight than I had standing in the road. The trees do not obstruct the view. There are a few little bushes right near the crossing that do not amount to anything so far as seeing is concerned. There is a tree about 300 yards from the crossing, off of the company's right of way, but it does not obstruct the view of trains coming on the West bound track. At the East bound track and the crossing you can see at least half a mile up track. From a point 45 feet on the road from the crossing up to the track there is nothing at all that I can see that would prevent you from seeing up the track for half a mile, because I walked it off, and Policeman Wall was with me. There is an electric bell at that crossing. When the train runs over the block bell a mile away, it turns on the circuit and the bell rings until the pony

34 wheels of the engine strike the trip near the bell post and the circuit is again cut off. There is an indicator in my office connected with the bell which is set the moment the train strikes the block bell and remains set until the wheels of the engine strike the trip right at the crossing bell. That bell could not ring without working this indicator. The bell was ringing and the indicator was working at the time of this accident. The action of the ringing of the bell also causes the indicator to make a slight noise, and if the bell was not working then the indicator would not move. It is my duty to report when the bell is out of condition. I looked at the indicator as the train approached and it was working. I noticed it as soon as the train struck the block bell which is away around the curve out of sight. I go by the indicator because I know it is impossible for it to work unless the crossing bell itself is working, because it is the back strokes of the crossing bell hammer which causes the vibration of the indicator.

On cross-examination the witness said:

I report the bell whenever it is out of condition.

Whereupon witness was asked this question:

Q. You have had occasion to report it a good many times, have you not?

To which question the defendant by its counsel objected, and the court sustained the objection, whereupon the plaintiff reserved an exception to the ruling of the court, and said exception was then and there noted on the minutes of the court.

35 The WITNESS: I am positive that the indicator was working at the time of the accident, and that the trip which starts the bell and the indicator is a mile from the station around the curve, which I think is about a mile away. I know that the crossing bell had to be working because the indicator was working. I did not pay any attention to the bell itself as I went by the indicator. It told me that the bell was ringing. I said I did not hear the bell ring

because I went by the indicator. Welker came up to the crossing at a trot and drove deliberately on the track in front of the train, which was only a short distance away. I should say it was not more than 50 or 75 feet from him. As far as I could see the horse and team were all going in front of the train. That is all I bothered about. I was throwing up my levers. It was so close that the horse realized its danger. It reared up and tried to get off the track. I was looking directly at him and was not talking to Mr. Buddington. He was not in the station. I was absolutely alone, with my hand on the lever, watching the train. No one was talking to me at the time. After the accident I dropped my lever and ran outside, and I saw Mr. Buddington on the platform. That is the first time I remember seeing him. He was walking towards my window. I motioned to the train to stop. It was being stopped at the time. I think it stopped about 200 yards from the station. The tool house is not quite half way between the station and the curve. Opposite the tool house, and off the company's right-of-way are some trees

36 near a branch or little creek, but they are so far off the right-of-way that you could see down the track without their interference. The cut does not begin until you get beyond the overhead bridge, which is near the curve. The cut is red clay, and does not show dark. Neither the trees nor the cut make a dark background up at the curve. I have been looking up that cut for the last two years and I never have had any trouble seeing a train. I saw this train as soon as it rounded the curve, which was about a mile away. The wagon did not get on the track until the train was almost there itself. The train was 50 or 75 feet away from the crossing when the wagon got on the track. He drove in front of the engine. His horse was walking while on the track, until he reared up and Mr. Welker struck him, and he sprang forward. Welker drove up to the East bound track in a trot and then went across in a brisk walk. I don't know whether Mr. Welker checked his horse or not. The horse would naturally check himself in going onto a rough piece of railroad. He did not stop at all. The electric bell rings after the engine strikes the upper trip and until it strikes the trip at the crossing. I did not fix the bell the day of the accident. I did nothing in the world to it. I saw Welker and some others at the crossing talking, and I walked down there with a hatchet and simply struck the rail first on one side and then on the other. I just wanted to see what Welker had to say as an excuse for driving in front of that engine. I did not go there because anything was the matter with the bell. I only went down and carried the hatchet in my hand, and I pounded the rail on one side and then on the other. I asked him what in the world excuse he had for driving in front of that train and he said "Why, I
37 don't know, I just thought I could get over, that's all. I could have turned around, but I just thought I could get over."

Q. How soon after that was it that you had a repair man come and fix that bell? A. They did not do any fixing; they didn't have to do any fixing.

Q. Did not a man come from Baltimore that same afternoon and fix that bell? A. I reported to Mr. Thompson, the signal engineer, that he might come down and make a thorough examination of the bell, but the bell was in perfect condition, and they did not have to do anything with it.

Q. Did you go down with him? A. I did not.

Although he saw Welker when he first started to cross the track he never attempted to warn him. You couldn't warn a man right within a few feet of an engine. It only took a few seconds to hit him. I was just shaking for him, just anxious for him. I was surprised to see that the man would drive in front of death itself.

Whereupon the defendant to further maintain the issues on its part joined called as a witness EDWARD WALTON, who testified as follows:

I am a B. & O. engineer and had charge of the engine which struck the wagon at Langdon crossing June 25, 1906. The train reached the crossing about 7:30 a. m. on its way from Baltimore to Washington. It was known as the second section of a regular train and was running about ten or fifteen minutes behind the schedule of the regular train. As I rounded the bend or curve approaching Langdon I blew the whistle for the crossing. Then after I got on the straight track so that I could see the block target I blew one long and one short blast for the target. The signal for the crossing was two long and then a short blast, and then another long one. Those signals were given by me as I rounded the bend. The track between Baltimore and Washington is under the block system and I had to blow for the target. After blowing for the target the operator gave me the clear signal and I answered with one short and one long blast of the whistle. The train was running between 40 and 45 miles an hour. I did not see the milk wagon until the horse reared up in front of the engine. I don't suppose at that time that he was half the length of this room ahead of me, and was on my track. I was on the right hand side of the cab, looking down the track and the first thing I saw was the horse's head passing in front of the engine. I applied the emergency brakes but could not stop the train in time to avoid the accident. I judged that I stopped within an eighth of a mile. The horse and wagon approached the track from the left side of the engine. I did not see the boy until after the wagon had been hit. Then I saw him roll over down in the ditch.

On cross-examination the witness said:

I should say that you have the sight of the crossing a quarter of a mile away. I had a clear and unobstructed view of the tracks for that distance, and I was keeping a look-out. From my position I could not see on both sides of the engine less than 25 or 30 feet ahead of the engine, but beyond that distance I could see on both sides of the track.

Q. Why was it you did not see this wagon then? A.

Well, I will tell you. When anyone tries to run into you, how are you going to see it? I couldn't on that side of it.

Q. You could not see but on one side of the engine. That is what I understand you to say? A. I can see on both sides of it up to 30 feet in front of me. The crossing was clear as far as I could see ahead of the engine, and this horse came right in front of me just about the time I was to go over the crossing. I blew for the road crossing when I was at the end of the curve and after that I blew for the target and answered it. When I blew for the target I was close enough to see whether it was red or white, but I don't know what distance that was from the crossing. The boy was thrown ten or twelve feet in the air.

Q. Is it not a fact that you did not stop the train until you came to Winthrop Heights? A. That ain't no quarter of a mile.

Q. How far is it? A. I say it is not much more than a quarter of a mile. I have been an enginer 18 years.

Whereupon the defendant to further maintain the issues on its part joined called as a witness WALTER R. GEARY, who testified as follows:

I am a fireman employed by the B. & O. and was on the engine with Mr. Walton at the time of the accident on June 25, 1906. The engineer blew for the crossing first and then he blew for the signal. The signal for the crossing was two short and two long blasts of the whistle. The signal for the target one long blast. As we approached the crossing I looked out, which is the fireman's duty, and seen the signal was white and I hollered "all right." I just noticed the wagon on the road, but paid no attention to it, as I went on firing. I judge the train was then about 100 yards from the crossing. The wagon was just about up to the crossing. I could not say what it was doing. I didn't pay no attention to it, as I went on firing. I judge the train was then about and I asked what the matter was and he said that he had struck a wagon. We were running about 35 or 40 miles an hour when we reached the crossing. When I noticed the wagon it was approaching the crossing. It was on the road which runs along the side of the tracks, and then turns to go over the crossing. I saw the rear end of the wagon. I was on the left side of the engine.

On cross-examination the witness said:

The train stopped as soon as possible, which was when it got to the next station.

Whereupon the defendant to further maintain the issues on its part joined called as a witness WILLIAM I. STRIDER, who testified as follows:

I was the conductor of the train that struck the wagon at Langdon on June 25, 1906. When we approached Langdon I was sitting in a dead head parlor car which was coupled next to the engine. As we approached the crossing I heard the sound of a whistle in two different ways. He blowed for

the road crossing and he blowed for the target and answered it. As we passed the crossing, I saw this wagon lying on its side, and I jumped up and ran out to the rear end of the car and looked out. The engineer was then trying to stop. As soon as the train stopped I ran back and found an officer and some men at the crossing. I found we had killed this little boy. When the signals were blown I supposed the train was 100 or 150 yards from the crossing; we had gotten around the curve and had just entered on the straight track in sight of the crossing. Don't know how far the curve is from the crossing.

On cross-examination the witness said:

We were running 10 or 12 minutes behind the regular schedule because our train was the second section. The first section was on time. We had no schedule for our train. The second section is supposed to go as soon as the blocks were clear. The train stopped between the bridge and Winthrop Heights, probably 150 or 200 yards from Langdon. I don't think the train was down at Winthrop Heights. Probably the engine might have been standing at the West end of the platform or near about it. But we had been back in the rear end of the train. We had 5 coaches and that would throw the rear end of the train some distance from the platform. I didn't notice whether the engine was standing at the platform but it was somewhere in that neighborhood. We found the boy about half the length of this room from the crossing, where he had been thrown.

42 Whereupon the defendant to further maintain the issues on its part joined called as a witness JAMES W. PLEDGE, who testified as follows:

I was baggage master on the train that struck the plaintiff's intestate. As we approached Langdon I was sitting in the dead head parlor car doing nothing. While the train was in the curve just below the overhead bridge the engineer blew the signal for the road crossing, two long and two short blasts of the whistle and after he got on the straight track within sight of the target he blew for the target and answered it. There was one long blast for the target and two short ones for the answer. As we went over the crossing I heard a bell ringing. There was an East bound train that came by about a minute after we stopped and I am not positive as to which train caused the bell to ring but it was ringing. Our train ran about 200 yards before it stopped. I saw the wagon had been hit and I reached up and pulled the whistle cord. I heard the brakes put on and told the conductor we had hit a wagon. I got off the train with the conductor and flagman when it stopped and went back to the crossing.

On cross-examination the witness said:

I am positive that the crossing bell was ringing when we passed it. It makes quite a loud noise. You can pass one of those bells on an express train and hear it ring. We were going between 40 and 45 miles an hour. The train stopped before it got to Winthrop Heights.

Whereupon the defendant to further maintain the issues
43 on its part joined, called as a witness JOHN B. ADAMS, who testified as follows:

I was brakeman and flagman on the train which struck the wagon at Langdon on June 25, 1906. I was on the rear end of the train as we approached the crossing. I heard the engineer blow for the road crossing. I think he was just out of the cut when he blew. He blew two short and two long signals for the road crossing. I can't say whether he blew for the target or not. The train came to a stop about 200 yards below the telegraph office and I got my red flag and went back and discovered that we had struck a wagon. I went back with the flag to protect my train. I saw the boy lying about 30 or 40 or probably 50 feet from the crossing towards the station. My train was going about 40 miles an hour. I can't say whether the electric bell was ringing or not.

On cross-examination the witness said:

Can't say if the train was at Winthrop Heights when it stopped.

Whereupon the defendant to further maintain the issues on its part joined called as witness EDWARD J. WALL, who having been previously sworn, testified as follows:

I made observations at the Langdon crossing for the purpose of determining whether or not the train could be seen approaching the crossing from Baltimore. I stepped off 15 paces from the track on the road in the direction from which this wagon approached this
44 crossing and I found that at that point you could see down the track towards Baltimore 13 telegraph poles. At ten paces from the track you could see down to the commencement of the curve, which I guess is about 19 or 20 telegraph poles off. Standing ten paces from the track and looking towards Baltimore there are no trees that obstruct the view down to the beginning of the curve. There are trees down there which are not on the right-of-way, and which, when you are on the road over 45 feet from the crossing, obstruct your view of the curve but within 45 feet they do not. There is nothing else there to obstruct the view of the train coming towards Washington. This crossing is sometimes referred to as Mills Avenue or Mills Road. The public use it but I know that the District would not repair a bridge that was on that road when I reported it because they did not have any control over the road, as it was not a public road.

On cross-examination the witness said:

The crossing has been used by the public for the 8 years that I have been there. At 45 feet from the track I can see a train coming 13 telegraph poles away. There is a Tool House on the West side of the tracks about 75 or 80 yards from the crossing, and there are trees opposite that tool house, but they do not prevent your seeing the track above that point. I examined the locality again this morning to satisfy myself in that matter. At a distance of 44 feet from the crossing on the road you cannot see quite to the

cut. You can see a distance of 13 telegraph poles, and when you
are within 10 or 12 feet of the track, the telegraph poles
45 and the electric bell pole do not prevent you from seeing.
They do not obstruct the view of the track. Approaching
the crossing along the road the trees which are in leaf now do not
prevent you from seeing the track beyond the tool house. I didn't
look at no train, but I looked at the road, and I seen the view before
me, that I would see a train coming about 13 poles.

Whereupon the defendant to further maintain the issues on its
part joined recalled THOMAS A. TIMBERLAKE, who testified as fol-
lows:

The crossing at Langdon is a private crossing. It has no name.
It is simply a road crossing. It is a private road which leads from
the Bladensburg Road up across the railroad to Corby Company's
property which was formerly the Butterine plant. The land is
owned by Mr. Dore and the Corby Company, and they opened the
road and people have been using it, but when anyone wants to do
heavy hauling over the road they have to get permission from the
Corby Company.

This was all the evidence offered on behalf of the defendant.

Whereupon the testimony being announced as closed on both
sides, and after discussion between court and counsel as to whether
or not the case on all the evidence should be submitted to the jury,
the court rules as follows:

"It seems to me that there is no doubt about the question of fact
that there was nothing the matter with this crossing bell, that
46 it was not out of condition, not out of repair, and it rang on
this occasion. I think that is as well established by the evi-
dence as is the proposition that the whistle was blown, and that there
cannot be any doubt about it; but for the sake of the question, it
may be conceded that there is a dispute upon the point of the ring-
ing of the crossing bell which would entitle the plaintiff to go to the
jury on that point, if the case turned on the finding as to that point.

But I cannot bring my mind to believe that the case stands upon
that proposition. So in what I have to say in ruling in that regard
it may be assumed that the crossing bell did not ring.

I cannot conceive that the railroad company would be liable to
the administrator of the child unless they had violated some duty
they owed the child; in other words, unless they had been guilty of
negligence towards the child, as distinguished from negligence
towards Welker. It might well be that a railroad company is negli-
gent concerning one individual and not negligent concerning an-
other. If a railroad company puts a bell on a crossing and says to
Welker "Here, I will ring this bell every time you come across when
a train is near," it might be negligence not to do that when Welker
came along, but it would not be negligence for the railroad company
not to ring that particular crossing bell when a stranger came along
who never saw that crossing, who did not know anything about
the bell, and who had no reason to expect the existence of the bell.

47 That is the case, so far as it concerns this child. There is no evidence in the case to show that he ever knew anything about the crossing bell or ever went by the crossing before.

So with respect to the child, the duty the railroad company owed with regard to that crossing was to notify this child of the approach of the train. If they did that, they performed the duty that was upon them in respect to him, and that they did by blowing the whistle of the engine. Nobody can doubt that that whistle was blown, if they impartially determinate the question.

I am not at all disturbed, as I said several times about the question whether the child was guilty of contributory negligence. That is a peculiar kind of a question. It never resolves itself into a question of law. It is always a question for the jury to say whether or not, under the circumstances of the case, the child exercised that degree of care and prudence that would and should be expected from a child of that age and intelligence and experience. So this ruling is based distinctly on the proposition that the child was not guilty of any contributory negligence, just as the ruling in the Barstow case was.

But as I was saying, the ruling in the Barstow case, to which counsel referred, tried in this court, was based entirely on the proposition that there was nothing in that case to show that the defendant was negligent there. That case went off upstairs on the proposition that was conceded down here, and that was that the child was not guilty of contributory negligence.

48 So I want this record to show that it is taken for granted that this child was not guilty of contributory negligence, and that the ruling is based on the proposition that there is nothing which tends to show that the railroad company violated any duty it owed the child, or is guilty of any negligence respecting the child so that the administrator of the child has a right to recover against it.

I cannot see any escape from that conclusion, gentlemen of the jury. You may return a verdict for the defendant."

To which ruling of the court the plaintiff then and there excepted, which exception was noted upon the minutes of the justice, and the jury thereupon returned a verdict for the defendant in accordance with the court's said instruction. All of said exceptions stated in the foregoing bill of exceptions were duly noted by the court upon its minutes at the time the same were taken during the trial of said case, and are now incorporated in this bill of exceptions, which is signed and sealed and made a part of the record herein this 20th day of July, A. D. 1907, *nunc pro tunc*.

[SEAL.]

DAN THEW WRIGHT, *Justice*.

Memorandum.

49 July 22, 1907.—Time to file record in Court of Appeals extended to and including September 4th, 1907.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 49 both inclusive, to be a true and correct transcript of the record, according to Rule Five (5) of the Court of Appeals of the District of Columbia, in cause No. 48951 At Law, wherein William H. Conger, Administrator, &c., is Plaintiff, and Baltimore & Ohio Railroad Company, a corporation, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the city of Washington, in said District, this 3rd day of September, A. D. 1907.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1826. William H. Conger, administrator, &c., appellant, vs. Baltimore and Ohio Railroad Co., a corporation. Court of Appeals, District of Columbia. Filed Sep 13, 1907. Henry W. Hodges, clerk.

